INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	17

CITATIONS

Cases:	
Connally v. *General Construction Co.*, 269 U. S. 385	9
Coplin v. *United States*, 88 F. 2d 652, certiorari denied, 301 U. S. 703	15
Daeche v. *United States*, 250 Fed 566	15
Hines v. *Davidowitz*, 312 U. S. 52	11
Lanzetta v. *New Jersey*, 306 U. S. 451	8
New York Life Ins. Co. v. *Taylor*, 147 F. 2d 297	15
Palmer v. *Hoffman*, 318 U. S. 109	15
Prevost v. *United States*, 149 F. 2d 747	7, 9
Screws v. *United States*, 325 U. S. 91	7
United States v. *Achtner*, 144 F. 2d 49	7, 8, 9
United States v. *DiOrio*, 150 F. 2d 938, certiorari denied November 19, 1945, No. 502, this Term	15
United States v. *Frederick*, 50 F. Supp. 769, affirmed, 146 F. 2d 488, certiorari denied, 324 U. S. 861	9
United States v. *Romberg*, 150 F. 2d 116	7, 8, 9
Warszower v. *United States*, 312 U. S. 342	15
Weiss v. *United States*, 122 F. 2d 675, certiorari denied, 314 U. S. 687	12
Wong Wing v. *United States*, 163 U. S. 228	11
Statutes:	
Act of June 20, 1936, 49 Stat. 1561 (28 U. S. C. 695)	15
Title I, subch. III, § 346 of the Nationality Act of 1940, 54 Stat. 1163 (8 U. S. C. 746)	2
Miscellaneous:	
86 Cong. Rec. 11939–11965	8
2 Wigmore, *Evidence* (3d ed., 1940), secs. 304–305	12

682053—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 733

STEVE TANDARIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 61–65) is reported at 152 F. 2d 3.

JURISDICTION

The judgment of the circuit court of appeals was entered November 17, 1945 (R. 65), and a petition for rehearing was denied December 7, 1945 (R. 80). The petition for a writ of certiorari was filed January 11, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the provision of the Nationality Act of 1940 making it a felony for any alien knowingly to falsely represent himself to be a citizen, is invalid under the First, Fifth, or Tenth Amendments.

2. Whether the trial court erred in admitting evidence of other similar offenses.

3. Whether there was any competent evidence of the corpus delicti aside from petitioner's extra-judicial admissions.

STATUTE INVOLVED

Title I, subch. III, § 346 of the Nationality Act of 1940, 54 Stat. 1163 (8 U. S. C. 746), provides in part:

> (a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—
>
> * * * * *
>
> (18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.
>
> * * * * *
>
> (d) Any person violating any provision of subsection (a) of this section shall be

fined not more than $5,000, or imprisoned not more than five years, or both.

STATEMENT

On September 22, 1944, petitioner was indicted in the District Court for the Northern District of Indiana for violation of the Nationality Act of 1940 (8 U. S. C. 746 (a) (18)). The indictment charged that "on or about the 2nd day of February, 1942, being then and there an alien, [he] did then and there unlawfully, wilfully, knowingly and feloniously, falsely represent himself to Bendix Home Appliance Corporation, South Bend, Indiana, and to the officials [thereof], to be a citizen of the United States without * * * having been naturalized or admitted to citizenship, or without * * * otherwise being a citizen of the United States" (R. 1–2). After a trial by jury petitioner was found guilty (R. 27), and he was sentenced to imprisonment for two years (R. 33). The Circuit Court of Appeals for the Seventh Circuit affirmed the conviction (R. 61–65).

The facts, so far as pertinent, may be summarized as follows:

Petitioner is an alien (R. 27). He was born in Yugoslavia, and came to the United States in 1911 at the age of four, but has never been naturalized (R. 16–21, 27). He filed an employment application with the Bendix company in May 1941 (R. 15; Pet. 37–38). He was hired in July

1941, was temporarily laid off for a week in November, and then worked there until February 16, 1942 (R. 15). During January and February 1942, the Bendix company "was engaged exclusively in work under contracts emanating from the government of the United States" (R. 60).

Chapman, formerly an official of the company, testified that it was the company's policy not to employ aliens; that "he interviewed the defendant when he first sought employment and that the defendant told him he was a citizen and that he put the OK mark in the corner of Exhibit 2 and approved his employment"; that if petitioner had said he was an alien, there would have been further investigation (R. 15). Government Exhibit 2,[1] to which Chapman referred, is an employment application form taken from the company's files (R. 15). It is made out in the name of "Bob Rebic," which alias petitioner used while working for Bendix (R. 11, 26–27). Among the questions printed on the form is, "Are you a U. S. citizen"; the written answer is "Yes." In the upper left-hand corner is written "OK." In the space provided for the date is written "5/4/41." (Pet. 38.)

[1] Government Exhibits 2, 3, and 4 are printed as appendices to the petition (Pet. 37–42). Exhibits 1, 7, and 11 are printed in the record (R. 13–14, 19–21, 24–25). The original exhibits 2, 3, 4, 5, 8, 9, and 10 have been filed separately with the Clerk of this Court (R. 81).

Exhibits 3 and 4 are also taken from the company's file and are part of petitioner's employment record (R. 15). They record the results of physical examinations. Exhibit 3 (Pet. 39–40) is dated "7/2/41" and gives petitioner's birthplace as Chicago. Exhibit 4 (Pet. 41–42) is dated "2/16/42" and gives his birthplace as Illinois. Reinke, personnel director of the company, testified that he conferred with petitioner with reference to Exhibit 4 (R. 15).

On August 16, 1944, petitioner was interviewed by two agents of the Federal Bureau of Investigation and in their presence (R. 11–13) signed a statement in which he admitted that "about July of 1941" he made application for employment at the Bendix company, using the name of Robert Rebic and giving Chicago, Illinois, as his birthplace. "I used the name of Robert Rebic and stated that I was a citizen of the United States in order to obtain employment at Bendix. I used the name of Rebic because I knew that if my past employment difficulties in the vicinity of Hammond, Indiana, plus the fact that I was an alien were known to the company I would not have been given employment." "I secured employment upon this representation." He also admitted that he used the name Rebic and gave Chicago as his birthplace when he was fingerprinted in February 1942 in connection with the national defense program. (R. 13–14.)

The Government introduced evidence of similar offenses committed by petitioner. He had falsely claimed citizenship in obtaining a passport to go to Spain in 1937 and in obtaining a reentry permit on his return (R. 12, 16). He had also represented that he was a citizen in applying for work at several other plants in northern Indiana (R. 12). To prove that petitioner is an alien, the Government introduced his "Alien Registration Form," in which he stated that he had served with the Abraham Lincoln Battalion in Spain in 1937 and 1938, and that he had been arrested on charges of assault and resisting eviction, though in both cases it appeared that he was not convicted (R. 17–21).

Petitioner, taking the stand in his own behalf, testified that he was unemployed most of the time from 1931 to 1937 and that "no sooner would he get a job than he would be discharged"; that he was a member of the CIO and that he changed his name upon advice in order to procure employment; that he had never represented to the Bendix company that he was a citizen. On cross-examination he admitted that he had applied for work at Bendix under the name of Rebic to conceal his identity; that the statement that he was born in Illinois was false; that he had falsified his citizenship in order to go to Spain to fight on the Loyalist side in 1937; and that he committed perjury in order to reenter the United States. (R. 26–27.)

ARGUMENT

1. We submit that petitioner's attack upon the constitutionality of the statute is not such as to warrant the allowance of the petition.

(a) Petitioner contends (Pet. 9, 11, 16, 18, 20–22) that the language of the particular section of the Nationality Act (8 U. S. C. 746 (a) (18)) is so ambiguous and vague as to be in violation of the due process clause of the Fifth Amendment; that a resident alien cannot tell whether he will be punished for any misrepresentation of citizenship, or only when made with intent to defraud; that this is shown by the decisions of the Circuit Courts of Appeals in *United States* v. *Romberg*, 150 F. 2d 116 (C. C. A. 2), *United States* v. *Achtner*, 144 F. 2d 49 (C. C. A. 2), and *Prevost* v. *United States*, 149 F. 2d 747 (C. C. A. 9). We submit, however, that there is no conflict between the *Achtner* and the *Romberg* decisions, for both hold that the misrepresentation, to be criminal, must be made to one who has "some * * * adequate reason for ascertaining * * * defendant's citizenship."[2] In both cases the test laid down is whether the misrepresentation was knowingly made to someone who

[2] This holding is based upon the reasoning that "the word 'falsely,' particularly in a criminal statute, suggests something more than a mere untruth and includes 'perfidiously' or 'treacherously,' * * * or 'with intent to defraud.'" *United States* v. *Achtner*, 144 F. 2d at 52. Cf. *Screws* v. *United States*, 325 U. S. 91, 101–103.

had a right to know the truth. It is true that the *Prevost* decision seems to differ in that it holds that the materiality of the misrepresentation is not an issue under the statute. But this does not avail petitioner because under either interpretation he would be guilty. Whatever doubts there may be as to the permissible scope of the statute's application, it was clearly intended to cover a false representation in response to "a legitimate inquiry on the part of an employer at a time of deepening national crisis." *United States* v. *Achtner*, 144 F. 2d at 52.

The Nationality Act of 1940, codifying and strengthening the existing laws pertaining to naturalization and citizenship, had been in course of preparation for a number of years, but it was called up specially in September 1940 and passed with a minimum of debate because it was felt that it would strengthen the hand of the Government against "fifth columnists." 86 Cong. Rec. 11939–11965, particularly pp. 11940, 11943, 11947. The section here involved is particularly adapted to this purpose and, as interpreted by the Second Circuit in the *Achtner* and *Romberg* cases, it sets up a standard of conduct which is sufficiently definite. This is not such a case as *Lanzetta* v. *New Jersey*, 306 U. S. 451, cited by petitioner, in which the state court sought to cure the vagueness of the word "gang" by specifying details of the offense intended to be charged. In this statute, as the Second Circuit showed in

United States v. *Achtner*, 144 F. 2d at 52, the word "falsely" has in the context a special meaning which provides a sufficient standard. Cf. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391–392.

In the circumstances presented here, we submit that there is no occasion for this Court to undertake to delineate the precise limits of the statute's application. It is true that the *Prevost* case seems to apply a more literal interpretation than the *Achtner* and *Romberg* cases, but in all the reported cases which have arisen, the facts show that the representation of citizenship was made to one who had a right to the truth.[3] Petitioner's situation is the same. He admits that he pretended to be Robert Rebic, a citizen, in applying at the Bendix company, and that he would not have obtained his position if it had been known that he was an alien (R. 13–14). Under these circumstances, his conduct in remaining with

[3] In the *Achtner* case, the representation was made to an employer in October 1941 "at a time of deepening national crisis." In the *Romberg* case, it was made to an official of the defendant's union investigating charges of inefficient work against the defendant which might have led to an accusation of sabotage. In the *Prevost* case, there were representations to a draft board, and to an employer in May 1942; the circuit court of appeals reversed the conviction on a point of evidence. In *United States* v. *Frederick*, 50 F. Supp. 769 (S. D. Tex.), affirmed, 146 F. 2d 488 (C. C. A. 5), certiorari denied, 324 U. S. 861, the representation was made to an election official; the only question on appeal was the sufficiency of the evidence.

the company through February 1942 amounted to a continuous representation of citizenship. Furthermore, he admits that in February 1942 he was fingerprinted in connection with the national defense program and that he still gave the name of Rebic and stated he was born in Chicago, Illinois (R. 14). This constituted a fresh representation of citizenship and plainly was made to one who had a right to know the truth.

(b) Petitioner asserts (Pet. 9, 11, 16, 18, 22–23) that the challenged provision is repugnant to the guarantee of freedom of speech contained in the First Amendment in that it makes the mere telling of a lie a criminal offense. But it is not the mere telling of a lie which is forbidden. As we have seen, it is the misrepresentation of citizenship to one who has the right to a truthful answer which is the gist of the offense. Consequently, petitioner's conviction is no more a violation of his right to free speech than would be his conviction on a charge of perjury.

(c) Petitioner also contends (Pet. 9, 11, 16, 18, 23–25) that the section in question is in violation of the Tenth Amendment in that it exceeds the powers granted to Congress. The argument is that the only relevant grant of power to Congress is "To establish an uniform rule of naturalization," and that, while the federal government has power to exclude and expel aliens, the power to punish a resident alien by fine and imprison-

ment rests with the states alone. Petitioner seems to think that the federal government, after it has admitted an alien, has no more authority over him than it has over a citizen, until he does some act which makes him liable to expulsion. It is true that the resident alien becomes subject to the police power of the states, and the states may even legislate for aliens as a class so long as there is no unjust discrimination. Cf. *Hines* v. *Davidowitz*, 312 U. S. 52, 76. But this Court pointed out in the *Hines* case, in holding that Congress, by adoption of the comprehensive, integrated Alien Registration Act, had precluded action in the same field by the State of Pennsylvania, that the power of the federal government to make "regulations touching the rights, privileges, obligations or burdens of aliens as such" is supreme (p. 63). The Court also said (p. 66), "And specialized regulation of the conduct of an alien before naturalization is a matter which Congress must consider in discharging its constitutional duty 'To establish an Uniform Rule of Naturalization * * *.'" Clearly the present statute, being a regulation of the conduct of aliens as such, was within the power of Congress to prescribe.[4]

[4] Petitioner cites *Wong Wing* v. *United States*, 163 U. S. 228, to the effect that Congress may exclude or expel aliens but may not punish them by fine or imprisonment. But the actual holding was that, while aliens may be excluded or expelled or subjected to temporary detention by summary proc-

2. Petitioner contends that there was error in the admission of evidence of other offenses (Pet. 10, 12, 16–17, 27–29). There was evidence that petitioner had knowingly made false claims of citizenship at other plants in order to obtain employment and that he had obtained a passport to Spain and a reentry permit by similar means (R. 12, 16). Since the Government had to prove that he had acted knowingly in the present case, all this evidence was admissible under the familiar rule that similar offenses may be shown to prove intent. 2 Wigmore, *Evidence* (3 ed., 1940), secs. 304–305; *Weiss* v. *United States*, 122 F. 2d 675, 682–688 (C. C. A. 5), certiorari denied, 314 U. S. 687.

Petitioner also complains (Pet. 28) because Government Exhibits 7 and 10[5] contain statements that he served in Spain as a member of the Abraham Lincoln Battalion and had been arrested twice. The two exhibits do not contain evidence of crime. Exhibit 7 shows on its face that neither arrest resulted in conviction (R. 21). Petitioner, while objecting to the exhibits as a whole, does not

---

ess, they may not be subjected to punishment by fine or imprisonment for violation of the immigation laws unless the right to trial by jury has been accorded them. 163 U. S. at 237.

[5] Exhibit 7 (R. 19–21) is a form which petitioner filled out under his proper name in compliance with the requirements of the Alien Registration Act. Exhibit 10 is a form which petitioner, again in his proper name, filled out for his draft board giving details as to his status as an alien.

seem to have made any specific objection to the parts of which he now complains (R. 17, 23). Had he done so those parts might have been concealed from the jury's view. The exhibits were admissible to show that petitioner was in fact an alien, and there is no showing that anything contained in them was prejudicial to him. Exhibit 11 (R. 24–25), of which petitioner also complains (Pet. 28), is a draft registration card issued to "Robert Rebic" in February 1942. It was clearly relevant and admissible to show petitioner's intent to conceal his true identity at the Bendix plant (R. 14).

In that part of the record which recites petitioner's cross-examination, there appears a reference to his having "falsified his citizenship in order to go to Spain to fight on the Loyalist side in 1937" (R. 27). Petitioner complains (Pet. 28–29) that this reference was calculated to prejudice the jury on political grounds, because it is "well known" that the members of the Abraham Lincoln Battalion were the objects of much abuse. However, we think it may be said with equal propriety that it is also well known that they were accorded as much, if not greater, praise, and there is nothing here to indicate that the jury was influenced one way or the other. Furthermore, the evidence had already come into the case as a part of two relevant exhibits.[6] Since the matter was already before the jury, this slight reference

[6] Exhibits 7 and 10.

on cross-examination can hardly have been prejudicial to petitioner in view of the overwhelming evidence of his guilt. Finally, it may be noted that it is impossible to be certain from the record whether the phrase "to fight on the Loyalist side" was a part of the government attorney's question or was a gratuitous addition by petitioner in answer to the attorney's question as to when and under what circumstances he went to Spain.

3. Petitioner's final contention is that there is no evidence, aside from his admissions to the F. B. I., that he committed the offense charged (Pet. 10, 16, 19, 29–35). His supporting argument is as follows: The only witness who directly testified to the offense was Chapman (R. 15), who said that petitioner told him he was a citizen "when he first sought employment," and petitioner argues that there is no evidence that this first visit to the plant was subsequent to the effective date of the Nationality Act;[7] next he contends that his employment application,[8] which was dated subsequent to that date, was inadmissible as hearsay, since there was no evidence that he had ever seen its contents; finally, he asserts that the only other evidence of the offense is to be found in the statements in Exhibits 3 and 4 (Pet. 39–42) that he was born in Chicago, Illinois, and he argues that the mere statement that a person was born in

[7] January 14, 1941.

[8] Exhibit 2 (Pet. 37–38).

the United States does not constitute a claim of citizenship.

The independent proof necessary to corroborate a confession need not be such as to establish the corpus delicti in itself. "Any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof." *Daeche* v. *United States*, 250 Fed. 566, 571 (C. C. A. 2).[9] We think the independent proof here was more than sufficient to meet the requirements of this rule and would have been enough in itself to establish the offense.

Exhibit 2, petitioner's application for employment, was properly admitted under the federal shop book rule.[10] It is dated "5/4/41," and contains the printed question, "Are you a U. S. citizen," and the written answer, "Yes." Chapman testified that he marked this application "O. K." and approved petitioner's employment after pe-

[9] See also *Warszower* v. *United States*, 312 U. S. 342, 345–348; *United States* v. *DiOrio*, 150 F. 2d 938 (C. C. A. 3), certiorari denied November 19, 1945, No. 502, this Term.

[10] Act of June 20, 1936, 49 Stat. 1561 (28 U. S. C. 695). *Palmer* v. *Hoffman*, 318 U. S.109; *New York Life Ins. Co.* v. *Taylor*, 147 F. 2d 297 (App. D. C.); *Coplin* v. *United States*, 88 F. 2d 652, 667–668 (C. C. A. 9), certiorari denied, 301 U. S. 703. Reinke, who had charge of the Bendix records, properly identified Exhibits 2, 3, 4, and 5 as the employment record of petitioner (R. 15).

titioner had told him that he was a citizen. We submit that there is no justification in the record for petitioner's claim that he had applied "a number of times at the Bendix plant" [11] (Pet. 30), and that the application, together with Chapman's testimony, constitutes sufficient proof that on May 5, 1941, petitioner represented to Bendix that he was a citizen.

Finally, even if the original statement to Chapman had been prior to the effective date of the Act, petitioner would be in no better position. The proof is clear that at some time he did represent to Chapman that he was a citizen. Thereafter, conscious that he would not have been hired if it had been known that he was an alien (R. 14), he accepted employment in July 1941, stated in connection with physical examinations in July 1941 and February 1942 that he was born in Illinois (Pet. 39, 41), and made the same statement when fingerprinted in connection with the national defense program in February 1942 (R. 12, 14). It is true that in themselves such statements do not amount to a claim of citizenship. But where they are intended to be so understood by the parties to whom they are made in the light of the prior false claim, and where they are parts of a scheme to maintain the representation, we think

[11] Reinke testified that Exhibits 2, 3, 4, and 5 "represented the employment record of the defendant, Steve Tandaric" (R. 15).

it clear that they come equally under the condemnation of the Act.

CONCLUSION

The decision of the circuit court of appeals is correct, and there is no conflict of decisions or important question of law presented by the facts of this case. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOSEPH M. HOWARD,
Attorneys.

FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946